

The CHAIRMAN. Thank you very much.

Mr. WILLIS. Thank you, Senator.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. I want to join my colleagues in thanking you for your efforts, but I sort of think that my good friend from Utah's comment was a little bit negatively pregnant with the fact that you have suddenly gotten religion and now you are doing a good job. And I have the feeling that you have done a good job over the years. I haven't always agreed with your conclusions. Most of the time I have. But I thought I was really bemused when sometimes in the past the ABA was accused of being too liberal. I was a practicing lawyer, and I have been a member of the ABA for a long time. And I never thought it was a liberal organization. Quite the opposite, I thought it was too damn conservative.

But having said that—

Senator HATCH. Of course, he thinks everything is too damn conservative. [Laughter.]

Senator METZENBAUM. Especially you, Orrin. [Laughter.]

Senator HATCH. Well, I think I probably am.

The CHAIRMAN. So far things are going well. Senator, do you have any further comment?

Senator METZENBAUM. With that said, thanks very much for all your efforts.

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

I would like to take just a moment or two to discuss the one question which really concerns me about the confirmation proceedings, and I join in expressing appreciation for the work that your organization has done. Your work, of course, was completed before these hearings started. I have already expressed my concerns about how much information we got on judicial ideology and judicial philosophy.

I was concerned, illustratively, that on a question about whether the Korean military engagement was a war raising the constitutional issue about the authority of the Congress to declare war. Judge Ginsburg wanted to have it briefed and argued before she would make a statement. Certainly the Korean conflict is not going to come before the Court, and I think many of the other questions which were asked on ideology and philosophy come into the same line.

When we had Justice Scalia, then Judge Scalia, for confirmation and I asked him about *Marbury v. Madison* as a pillar of constitutional interpretation that the Supreme Court is the final word, he wouldn't answer the question because it was an issue which he thought might come before the Court. At that time I expressed the sentiment, as I did with Judge Ginsburg, that so far as I am concerned that issue is rockbed; and if someone is not going to uphold *Marbury v. Madison*, I don't think that person is fit to serve on the Supreme Court.

I think Justice Scalia would uphold *Marbury v. Madison*, which was my conclusion, and I voted for him. But he wouldn't say. The question about whether the Congress has the power to take away jurisdiction of the Court on constitutional issues, I think, is also rockbed. I don't think that is subject to being litigated.

I asked Judge Ginsburg whether she would rule out Congress' authority to take away the jurisdiction of the Court on equal protection, an issue on which she is really a champion. And in my questioning of Judge Scalia, it took all the way to a question of, "Will you let somebody litigate after you are on the Supreme Court the question of whether you have an obligation under your oath to uphold the Constitution?" "Judge Scalia: I think you have finally gone over the edge of certainty so much that I have to say of course not."

But that is what it took to find an answer for Justice Scalia that he wouldn't have litigated before his Court.

Judge Ginsburg wrote an article on the authority of the Senate giving a second opinion after the President gives the first opinion, said it was not a secondary opinion; and at the conclusion of the article, she accepted the language of her former Columbia colleague, Prof. Louis Henken, to this effect: In an appointment to the U.S. Supreme Court, the Senate comes second but is not secondary. The standards the Senate should apply are the same as those that should govern the President, what would serve the national interest, not simply for today's cases but for the long term.

And I would just like your opinion, if you would give it to me, Mr. Willis, Mr. Best. Do you think it is within the purview appropriately of a Senator to vote against a nominee who won't answer questions, say to the extent that Judge Scalia took a question about challenging his oath before he would respond?

Mr. WILLIS. I won't myself pretend to give advice to a Senator on a subject like that. I think the Senator has to use his own conscience and conviction in deciding what action to take.

I should emphasize that the work of our committee is limited to investigating the qualifications of the nominee with respect to integrity, judicial temperament, and professional competence. We do not get into philosophy. We do not get into where the judge, the judicial candidate stands with respect to a particular issue.

Obviously the interest of this body may very well be broader than that, but when it comes to integrity, professional competence, and judicial temperament, Judge Ginsburg has our very strong endorsement.

Senator SPECTER. Mr. Willis, you are a New Yorker?

Mr. WILLIS. Yes, sir.

Senator SPECTER. I hope you run for the Senate so you can give me some advice.

Mr. Best, you are from the District of Columbia. I hope you have a chance to run for the Senate.

Mr. BEST. Well, I would be pleased to have that opportunity sometime, Senator.

Senator SPECTER. What is your view on my question?

Mr. BEST. Well, my view is coincident with Bill Willis. We have a very narrow spectrum of interest, and certainly if I ever decide to run for the Senate, then maybe I could address the issue of whether or not there is discretion in a U.S. Senator on the issue that you have presented.

Senator SPECTER. Thank you very much, Mr. Best. Thank you, Mr. Willis.

The CHAIRMAN. Thank you.